IN THE

Supreme Court of the United States,

OCTOBER TERM, 1916.

No.

THE SAVINGS BANK OF DANBURY,
Plaintiff-in-Error,

vs.

DIETRICH E. LOEWE, as surviving partner of the firm of D. E. Loewe & Company,
Defendant-in-Error.

MOTION TO ADVANCE.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Comes now the Defendant-in-Error by his attorneys, and moves that the above-entitled cause be advanced and set down for argument at an early date.

Statement of Matter Involved.

This is an action in *scire facias* to satisfy judgment obtained in the case of Loewe *vs.* Lawlor (Danbury Hatters' Case), by collecting savings banks accounts which

were attached in that case. That said case of Loewe *vs.* Lawlor was commenced in September, 1903; that in 1907 it reached the Supreme Court of the United States for decision on demurrer, and in February, 1908, the demurrer was overruled by that court (208 U. S. 274); that on April 18th, 1910, after trial by jury, judgment was secured for $232,240.12; that said judgment was reversed on defendants' writ of error and that on the 15th day of November, 1912, after a second jury trial, judgment was secured for $252,130.90; that said judgment was affirmed by the Circuit Court of Appeals on writ of error and on January 5th, 1915, said judgment was affirmed by the Supreme Court of the United States (235 U. S. 522).

In order to satisfy said judgment, plaintiff brought suits against various savings banks (including plaintiff-in-error herein) to recover the amount of certain attached savings bank deposits belonging to the original defendants; that it appeared that said attached accounts had been purchased by the United Hatters of North America, the union to which said defendants belong, and that said United Hatters of North America was the owner of said accounts subject to the rights of the defendant-in-error herein as attaching creditor; that the said United Hatters then claimed that the interest or dividends which had accrued on such savings bank accounts subsequent to the attachment, amounting in all to about $20,000.00, belonged to it and were not held by the attachment, and said United Hatters demanded payment of said moneys; that the said banks thereupon severally caused notice to be given to the United Hatters of the suits brought against them by the defendant-in-error herein, and said United Hatters subsequently appeared and answered, claiming said interest; that the District Court ruled that the United Hatters was entitled to said interest or dividends (226 Fed. 294) and only gave the plaintiff judgment for $428.52, the amount of unpaid principal. Plaintiff sued out a writ of error to the Circuit Court of Appeals for the Second Circuit, which held that he was entitled to

such dividends by virtue of his rights as attaching creditor and the judgment was accordingly modified and affirmed (Fed.). The parties to these respective suits stipulated that the entry of final judgment in all said suits, except the one now before this court, should await and be determined by the final disposition of this present suit on writ of error; that the final decision in this suit will therefore determine who is entitled to the accumulated dividends in these various banks, aggregating about Twenty thousand dollars ($20,000.).

Reasons for Application.

The plaintiff herein has also started foreclosure proceedings against one hundred and forty (140) pieces of real estate for the purpose of satisfying said judgment, but he desires to first know whether the $20,000.00 interest on the savings bank accounts is applicable to the satisfaction of said judgment, and to satisfy said judgment as far as possible from this source before resorting to a sale of the real property. That he has only collected about $35,000 00 on account of his said judgment, and since it was fourteen years ago that his business was attacked and nearly thirteen years ago that he originally entered court, and since this proceeding is brought for the sole purpose of securing indemnity for the damage so caused about fourteen years ago, and of securing the relief sought in court nearly thirteen years ago, the plaintiff believes that he should have a preference in the hearing of this case.

Respectfully submitted,

DANIEL DAVENPORT,
WALTER GORDON MERRITT,
Attorneys for Defendant-in-Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No.

THE SAVINGS BANK OF DANBURY,
Plaintiff-in-Error,

vs.

DIETRICH E. LOEWE, as surviving partner of the firm of D. E. Loewe & Company,
Defendant-in-Error.

TO THE PLAINTIFF-IN-ERROR AND ITS ATTORNEYS, J. MOSS IVES, AND TO THE UNITED HATTERS OF NORTH AMERICA AND ITS ATTORNEYS, WILLIAM F. TAMMANY AND MARTIN J. CUNNINGHAM:

You, and each of you, will please take notice that the Defendant-in-Error will on Monday, the 9th day of October, 1916, at the opening of Court on the morning of that day, or as soon thereafter as counsel may be heard, move the above-entitled Court to advance the hearing of the above-entitled case.

DANIEL DAVENPORT,
WALTER GORDON MERRITT,
Solicitors and Attorneys for Defendant-in-Error.

The undersigned join in the request that the cause be advanced.

J. Moss Ives, Atty for Savings Bank of Danb

Wm F. Tammany

Solicitor and Attorney for The United Hat

BRIEF FOR UNITED HATTERS OF NORTH AMERICA, CITED IN TO DEFEND.

(RECORD, PAGE 9)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 713

THE SAVINGS BANK OF DANBURY, OF DANBURY, CONNECTICUT, PLAINTIFF IN ERROR

v.

DIETRICH E. LOEWE, AS SURVIVING PARTNER OF THE FIRM OF D. E. LOEWE & CO.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND DISTRICT

(25,543)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 713

THE SAVINGS BANK OF DANBURY, OF DANBURY, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

DIETRICH E. LOEWE, AS SURVIVING PARTNER OF THE FIRM OF D. E. LOEWE & CO.

In error to the United States Circuit Court of Appeals for the Second Circuit.

Brief for United Hatters of North America, Cited in to Defend.
(Record, page 9.)

But one question is presented by the record. Certain dividends have been declared by the plaintiff in error since the attachment was made under the Connecticut garnishee process. Do said dividends belong to the defendant in error, or are they the property of and payable to the United Hatters of North America under the assignments from the original depositors?

The trial court held that the defendant in error is not entitled to said dividends.

Judgment, page 11 of record.
Opinion, page 14 of record.

The circuit court of appeals held that the defendant in error is entitled to said dividends.

Opinion, page 27 of record.

the hands of the garnishee **at the time of the attachment,** or **debts then due** from him to the defendant" shall be liable for the payment of any judgment in a case such as the one at bar, and distinguishes between such effects or debts and any debt, legacy or distributive share due or to become due from an estate. And still more significant is that portion of said section which provides that if the garnishee "shall not pay to the officer, when demanded, the **debt due to the defendant at the time the copy of the writ was left with him,** such garnishee shall be liable" etc. No mention is made in Section 880 or Section 931 of dividends or profits. If the legislature had intended that dividends and profits should be held by the garnishee process, it would beyond any doubt have so provided. When the legislature found it expedient and advisable in another connection to provide for the attachment of dividends and profits it found no difficulty in expressing its purpose. Attention is directed to Section 833 and 915 of the Connecticut Statutes.

> Section 833 provides: "Rights or shares in the stock of any corporation, together with the **dividends and profits** due and growing due thereon, may be attached" etc.
>
> Section 915 provides: "The levy of an execution on the rights or shares which any person owns in the stock of any corporation, together with the **interest, dividends and profits,** due and growing due thereon, shall be by leaving a true and attested copy" etc.

In the one case the Legislature provided for the attachment of dividends and profits. In the other case, it did not so provide. In each case we think the Legislature clearly expressed its purpose. The principle of law is well settled that when the Legislature has expressed itself in clear and unmistakable language, nothing is to be taken by intendment. This principle applies with great force to the Statutes to which attention has above been directed. Moreover, the provision for the attachment of profits and dividends in the one case impliedly prohibits their attachment in the other.

> In City of New Haven v. Whitney, 36 Conn., 373, 375, the Court say:
>
> "A statute that prescribes that a thing should be done in a particular way, carries with it an implied prohhibition against doing it in any other way."
>
> Broom's Legal Maxims, 7th Ed., 664.

Our contention is that **only the estate existing at the moment of service is held by the attachment. At the time of service of the process the dividends in question had not been declared, were not in existence, and were not held by the attachment,** and we submit that the defendant in error (original plaintiff), in instituting this action, realized that he could recover only the money and estate of the judgment defendants in the hands of the plaintiff in error at the time of service of the writ in the original action; and said money and estate then in the hands of said Bank is all that is described or claimed in the writ and complaint in this action. Record, 2 to 5 inclusive.

As said in Fitch vs. Waite, 5 Conn. 117, 122:

> "The moment of service, is the precise period, when a debt is attached; and if it be then existing, it is secured by the process; but if it does not then exist, no lien is created; as the operation of an attachment, by its nature is immediate, and not prospective. A future liability is not attachable, for the conclusive reason, that it is not a debt due."

The foregoing case is quoted by the Court in Grosvenor vs. The Farmers & Mechanics Bank, 13 Conn., 104, 107, where the Court say:

> "These principles have received the sanction of Courts of great respectability."
>
> Cites numerous cases.

The Statutes of Connecticut which regulate the declaration of dividends by Savings Banks are as follows:—

> Section: 3440. "The net income of any savings bank, in excess of one-eighth of one per cent. of its deposits, actually earned during the six months last preceding, and no more, may be semi-annually divided among its depositors. No dividend shall exceed a rate of four per cent. per annum, except as provided in Section 3441."
>
> Section 3441. "No savings bank shall make any dividend, except as provideed in Section 3440, unless its surplus shall have accumulated to an amount equal to three per cent. of its deposits. Such surplus shall be kept as a contingent fund; but no savings bank shall carry to its contingent fund, more than ten per cent. of its deposits; and any surplus beyond that amount, shall be divided among the depositors entitled to such dividends, in sums of not less than one per cent of its deposits."

Section 3441 was amended by Chapter 187, Connecticut Public Acts of 1913, by increasing the amount which might be carried to the contingent fund from ten to not more than fifteen per cent of deposits, and by setting forth what the contingent fund should include.

Section 3442 authorizes discrimination between deposits of one thousand dollars or less, and those over that sum.

The dividends in question have been declared semi-annually by the plaintiff in error agreeable to the foregoing sections of said statutes and the Bank's charter.

The course of the Bank's conduct was and is, therefore, specifically defined and limited by the law. There was no contract for the payment of interest, and such contract, if made, would be **ultra vires** and void. The Bank performed the duty imposed on it by law, and there is no legal liability for interest. The Bank has at all times had the money to pay, and has been ready to pay on demand as soon as payment could safely be made. The Bank is not, in any sense, a litigant.

Cyc., Vol. 20, page 1067.

The Circuit Court in its opinion (Record-Page 34) says:

> "And the record in this case does not disclose the organization, powers and mode of doing business of the Danbury Savings Bank. We do not know whether it had capital stock or not."

We think this statement is sufficiently met by reference to the General Statutes of Connecticut, of which the Court must take judicial notice, and by the opinion of the trial judge (Record, page 17) where the Court says:

> "And this brings us to the vital question involved:—were these banks (in the absence of an express contract to pay interest) under legal obligation to pay these depositors interest on their deposits as an incident of the deposit, and was there any legal remedy open to the depositors at the time of the attachments to enforce such obligations? In my opinion each of these questions must be answered in the negative. Savings banks, as they exist in Connecticut are held to be incorporated agencies of the depositors for their benefit, and a person making a deposit in a savings bank becomes substantially a part owner of all the assets of the bank. This was held in Osborn vs. Byrne, 43 Conn., 155, 160, where it was said that a savings bank is an incorporated agency for re-

ceiving and loaning money on account of the owners; it has no stock and no capital, and is merely a place of deposit where money can be left to remain or to be taken out at the pleasure of the owner, and that the depositors in savings banks bear the same relation to each other and to the assets of the bank that stock-holders in other monetary institutions do to each other and to the property of the bank."

WHETHER ANY SAVINGS BANK WILL EARN AND DECLARE DIVIDENDS IS INDEFINITE AND UNCERTAIN.

Whether or not earnings or profits will be made by any savings bank is indefinite and uncertain. Savings banks have failed before this, and others will fail. Any one of many things may cause this result.

The garnishee process will hold only existing debts or obligations. There must be no uncertainty, and the fact that it is morally certain that a debt will mature and become due, makes no difference. The dividends declared by the several savings banks, are of this character. In the case of Easterly vs. Keney, 36 Conn., 18, 22, the Court say:

"The relation of the petitioner to the rents and profits therefor, does not differ in any respect from that of any other creditor of the **cestui que trust,** or from that of any creditor to the funds of his debtor in the hands of a third person. If the trustee has the funds in his hands belonging to the **cestui que trust,** they are liable to foreign attachment, and this is adequate remedy at law, so far as they are concerned. In relation to the rents and profits that **may here after** come into the hands of the trustee, we know of no law or practice that will enable the petitioner, by the aid of a petition, to seize them **before they accrue** or come into the hands of the trustee. The mere fact that it is **morally certain** that the trustee will, at times, have the funds of the cestui que trust in his hands, can make no difference. If this petition can be sustained, so could one in any case where the probability is strong that the funds of a debtor will come into the hands of a third person, which would be a novel proceeding in courts of equity. We think it cannot be done. The petitioner has acquired no interest in these funds by attachment or execution. He stands merely in the relation of a creditor to a debtor, who may have funds in the hands of a third person."

The case of Smith vs. Gilbert, 71 Conn., 149, further shows that the garnishee process does not deal with uncertainties. Here an attempt was made to attach real estate, and to factorize a legacy due, or to become due, to the defendant. The Court, page 156, say:

> "The process of foreign attachment is unadapted to secure an interest in remainder so remote and uncertain. It contemplates an uninterrupted and continuous possession by the garnishee, from the date of the attachment, to that of the demand on execution. The executor has no power to hold enough of the personal property and money of the estate, to pay this possible legacy, until the happening of the event upon which the legacy depends, and until demand is duly made upon him as garnishee upon execution in the action by foreign attachment. Before that time, the Court of Probate may order the money and personal property to be delivered to the widow upon her giving a proper bond, and upon her failure to give such bond, the Court of Probate will appoint a trustee to take charge of such estate during the continuance of the life estate."

In the case at bar, the dividends might never have been declared. The earnings might not have justified the declaration of a dividend; there might have been a run on the bank, resulting not only in no declaration of dividend, but in other losses to the depositors; there might have been dishonest employees, as there have been in other banks; the money might have been paid into court by the bank; or any one of a great many things could have prevented the declaration of dividends, so that whether anything would ever be earned or become due or payable, following said attachment, is uncertain and problematical. Surely that was not the existing debt which the law contemplates.

In Geer vs. Chapel, 77 Mass., 18, the Court holds that Juror's fees which have not been allowed by the Court, are not subject to trustee process in foreign attachment, though the services had in fact been rendered.

In Hancock vs. Colyer et ux, 99 Mass., page 187, the Court say:

> "The check of a third party to the order of the supposed trustee, is not attachable by trustee process. It is not money, goods, effects or credits, in the sense of the statute. It may never **be paid.** The liability of the trustee to the principal defendant is therefore contingent." And on page 188 (same case), the court say:

"The other ground of distinction cannot prevail against the well settled rule that the validity of the attachment must be determined by the **state of facts existing at the time** of the service of the writ."

Meacham vs. McCorbitt, 2 Met. 352.
Knight vs. Bowley, 117 Mass., 551.
Land vs. Felt, 73 Mass., 491.

In Hadley vs. Peabody, 79 Mass., 200, the salary of a school teacher was payable quarterly, and the service of trustee process was made in the middle of a quarter. It was held that the process was of no effect, the Court saying:

"It was not a debt, and might not become a debt; the contract was entire, and until completed on the part of the teacher, nothing was due. We think this point is settled by authorities."

Brackett vs. Blake, 7 Met. 335.
Robinson vs. Blake, 7 Met. 335.
Daily vs. Jordan, 2 Cush. 390.
Osborn vs. Jordan, 3 Gray, 277.

In Wyman vs. Hichborn, 60 Mass., 264, where the salary of a clergyman was payable quarterly, and he resigned before the quarter expired, and an attempt was made to attach for the period of actual service, the Court say:

"The claim against the trustee may be a debt **payable in future,** but to charge the trustee, it must be a **certain debt** which will become payable **upon the lapse of time,** and **not a contingent liability,** which may become a debt or not, on the performance of other acts, or the happening of some uncertain event."

Taber vs. Nye, 29 Mass., 105.
Tucker vs. Clisby, 29 Mass. 22.
Guild vs. Holbrook, 28 Mass. 101.
Frothingham vs. Haley, 3 Mass. 67, 70.
Willard vs. Sheafe, 4 Mass. 234, 235.

THE WORDS "INTEREST AND DIVIDEND" ARE NOT INTERCHANGEABLE.

The Circuit Court treated the words "interest" and "dividend" as practically interchangeable. In this we claim the Court to have erred.

In Carey vs. Savings Union, 22 Wall (U. S.), 38, it is held that "where depositors in a savings bank do not receive a fixed rate of interest independently of what the bank itself makes or loses in lending their money, but receive a share of such profits as the bank by lending their money makes, after deducting expenses, etc., such **share of profits** is a **dividend,** and **not interest."**

In Gibbons vs. Mahon, 136 U. S. 558, the Court say:

"Money earned by a corporation remains the property of the corporation, and does not become the property of the stockholders, **unless** and **until** it is distributed among them by the corporation. The corporation may treat it and deal with it either as profits of the business, or as an addition to its capital. Acting in good faith and for the best interests of all concerned, the corporation may distribute its earnings at once to the stockholders as income; or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years; or it may retain portions of its earnings and allow them to accumulate, and then invest them in its own works and plant, so as to secure and increase the permanent value of its property."

And in the same case, the Court say:

"A dividend is something with which the corporation parts."

In New York, Lake Erie & Western Railroad Co., vs. Nickols, 119 U. S., 296, as to when dividends are payable, the Court say:

"A declaration of profits, as, in itself, and without further action by the directors, entitling shareholders to dividends, is unknown in the law or in the practice of corporations. Dividends are **"declared"** by some formal act of the corporation, the question whether there are or are not profits, being settled entirely by the accounts of the Company as kept by subordinate officers, not by the mere statement of directors as to what appears upon its books. * * * * We are of the opinion that while the agreement of 1877 and the articles of association sustain the claim of preferred stockholders to a six per cent dividend in advance of common stock-holders, the former are **not entitled, of right, to dividends,** payable out of the net profits accruing in any particular year, **unless** the **directors** of the Company **formally declare,** or **ought to declare, a** dividend payable out of such profits; and whether a **dividend should be declared** in any year, is a matter **belonging in the first instance** to the directors to determine, with reference to the condition of the com-

pany's property and affairs as a whole."

In Mobile & Ohio Railroad Co., vs. Tennessee, 153 U. S. 486, the Court defining the term "dividend" says:

> "The term **'dividend'** in its technical as well as in its ordinary acceptation, means that portion of the profits which the corporation, **by its directory,** sets apart for ratable division among its shareholders."

In Bryan vs. Sturges National Bank, 40 Texas Civil Appeals, 307, 311, affirmed 101 Texas 630, the Court say:

> "The accumulated earnings or surplus funds of a bank constitute a part of its assets, and belong to the corporation and not to the stockholders, until they have been **declared and set apart as dividends."**

And in said case, the Court also say:

> "The **dividends thereafter declared,** and which it is now sought to reach and subject to the payment of James W. Boyd's debt, had **no existence** and were not property within the meaning of the statute at the time he was declared a bankrupt, and discharged from liability as to former indebtedness."

> And the Court further say: "but * * * * * title to the **dividends cannot exist until after such dividends** have been brought into **existence, by a declaration to that effect,** by the governing body of the corporation."

Cyc, Vol. 10, page 546.

In Southern Amusement Co., vs. Neal (Georgia Court of Appeals, 1914) 82 S. R. 765, 766, the Court says:

> "Of course, it is well settled that a creditor cannot reach by garnishment, assets which the debtor himself could not recover from the garnishee; for what one cannot recover himself, cannot, by garnishment, be recovered against him."

Drake in his work on "Attachments" Section 551, says:

> "The debt from the garnishee to the defendant, in respect of which it is sought to charge the former, must moreover be absolutely payable, at present or in future, and not dependent **on any contingency.** If the contract between the parties be of such a nature that it is uncertain and contingent whether anything will ever be due in virtue of it, it will not give rise to such a credit as may be attached; for that cannot properly be called a debt which is not certainly and at all events payable, either at the present or some future period."

Taber vs. Nye, 12 Pick, 105.
Wood vs. Patridge, 11 Mass. 488.
Hadley vs. Peabody, 13 Gray, 200.
Brackett vs. Blake, 7 Met. 335.

In Section 553, the same authority says:

"As the attaching plaintiff can acquire no other or greater rights against the garnishee than the defendant has, it follows that though the garnishee be indebted to the defendant, yet if there be anything to be done by the latter as a condition precedent to his recovering his debt in an action against the garnishee, the plaintiff cannot obtain judgment against the garnishee, without performing the condition."

The same authority in Section 667 says:

"The garnishee's liability, considered with reference to the time of garnishment, cannot, without the aid of special statutory provision, be extended beyond the defendant's effects or credits in his hands **at the date of the garnishment.** The attachment is the creative of the law, and can produce no effect which the law does not authorize. Its operation, when served, is upon the attachable interests **then in the garnishee's possession;** and it cannot be brought to bear upon any liability of the garnishee to the defendant **accruing after its service, unless the law so declare.** And if such liability at the time of the garnishment be dependent on the happening of a contingency, which does happen afterwards, so as to create an absolute debt, yet the garnishee cannot be so charged; for such was not the condition of things at the time of the garnishment."

Williams vs. A. & K. Railroad Co., 36 Maine, 201.

Bouvier's Law Dictionary, (Rawle's Third Revision), defines "interest" as follows:—

"The compensation which is paid by the borrower of money to the lender for its use, and, generally, by a debtor to his creditor in recompense for his detention of the debt.

The compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money.

A consideration paid for the use of money or for forbearance in demanding it when due."

These definitions of "interest" and the foregoing authorities on "dividends" show the very marked difference in the meaning of the words.

That this difference is recognized in Connecticut is shown by the case of Lippitt vs. Thames Loan & Trust Co., 88 Conn., 185, in which (page 207) the Court say:

> "Savings bank depositors, as a rule, are not entitled to dividends on their deposits, until declared. As we understand the facts of this case, the several savings department depositors have not made their deposits upon a special contract to pay them a stated rate of interest If our understanding be correct, the savings department depositors are not entitled to **interest,** or to **dividends** upon their deposits **beyond the last declaration of dividend."**

This case would seem to be conclusive of the case at bar. The judgment defendants, whose accounts were attached, were entitled, on that date, to recover from the banks only the amount then due, including the dividends last declared. For the intervening time, if the money had been withdrawn, they were entitled to absolutely nothing. The attaching creditor held exactly what was then due to the judgment defendants and no more.

Cyc, Vol. 5, Page 555.
Cyc, Vol. 20, Page 1054.

In the case of Ransom vs. Bidwell, 89 Conn., 137-140, Section 880, of the General Statutes, is construed, and the use of the word "due" as used therein, is defined as follows:

> "The meaning of the word 'due' as used in this statute, is one of the controlling questions in the present case. This word is defined in the Bouvier Law Dictionary (Rawle's 3d. Revision, p. 946), as "what ought to be paid; what may be demanded." It is also stated by Bouvier that the word 'due' differs from 'owing,' in that a thing that is owing may not be due."

And in the same case, page 141, the Court say:

> "It is apparent that the words 'debt due' as used in Section 880 of the General Statutes, imply an **existing obligation to pay** either in the present or future. This doctrine has been expressed in many of the decisions by this Court, nor has this rule been confined to cases where the amount of the claim garnisheed was liquidated."

In the case at bar, there was no existing obligation to pay interest or dividends either in the present or in the future. There was no contract to pay. There was no duty imposed by law to pay. The conditions did not exist which bring the case within the Connecticut Garnishee Statute. The

dividends were not earned, or due, or owing, at the time of the attachment, but were uncertain and contingent.

That the dividends were not held by the attachment we think can be shown in another way.

Section 849, General Statutes of Connecticut, 1902, provides for the dissolution of attachment of "any debt or effects taken by process of foreign attachment" on application and "upon the substitution of a bond with surety." Section 850 prescribes the form of application; section 851 provides for notice to the plaintiff, or his attorney, and prescribes the form of notice; section 852 provides for the amount of the bond, and hearing as to its sufficiency; and section 853 prescribes the form of the bond and for the payment by the surety to the plaintiff of "the actual value of the interest of" the defendant "in said attached property at the time of said attachment, not exceeding the amount of" the recognizance.

Assume that immediately after the money in the defendant Bank had been attached the original defendants had made application to the court for the dissolution of the attachment on substitution of bond, with surety; that the necessary statutory steps were taken, a bond ordered and given, the money released from the attachment and withdrawn from the Bank, and immediately redeposited in the bank in the name of the bondsman, and dividends declared and credited thereon; that ultimately the plaintiff recovered judgment, and perforce must look to the bond for payment. What amount can he recover? He will be limited absolutely to the actual value of the estate at the time of the attachment—to the amount of money credited to the original defendants at the time of service of the process on the Bank. The dividends would belong to the bondsman.

Perry vs. Post et al., 45 Conn., 354.
McNamara vs. Mattei, 74 Conn., 170.
Mallory vs. Hartman, 86 Conn., 615.

In the case at Bar no bond was substituted for the property attached, but the United Hatters of North America paid to the original defendants the amounts of their deposits and received from them transfers thereof, and thereupon became the equitable and **bona fide** owner of said estate subject to the attachment. No attempt was made to withdraw the money from the Bank, but the attached estate was left intact to respond to any judgment to the amount of the actual value of said estate at the time of attachment, just as though a bond in fact had been given. Had the bond been

given, the attachment dissolved, and the money then transferred to the United Hatters, the dividends would unquestionably have belonged to them; and we contend that the dividends are theirs just as fully as though a bond had been given. The only real difference is that the cash was left in the bank and was available to apply on the judgment, instead of being recoverable under a bond.

THE DEFENDANT IN ERROR ACQUIRED A LIEN ONLY ON THE ATTACHED PROPERTY.

The attached property was made subject to a lien in favor of the attaching creditor, but we claim that the lien attached only to property in existence, or debts due at the time of the attachment.

Real Estate in Connecticut is attached in a manner very similar to that of the Garnishee Process. Section 829 of the General Statutes provides as follows:—

> "Real Estate shall be attached by the officer by lodging in the office of the town clerk of the town in which it is situated a certificate that he has made such attachment, which shall be indorsed by the town clerk with a note of the precise time of its reception, and kept on file, open to public inspection, in the office of said town clerk; and said attachment, if completed as hereinafter provided, shall be considered as made when such certificate is so lodged. The certificate shall be signed by such officer, shall describe the land attached with reasonable certainty, and shall specify the parties to the suit, the court to which the process is returnable, and the amount of damages claimed; and the officer shall, within four days thereafter, leave in the office of such town clerk a certified copy of the process under which the attachment was made, with an endorsement of his doings thereon; and unless the service shall be so complete, such estate shall not be holden against any other creditor or bona fide purchaser."

Section 921 provides for levy of execution on real estate, and section 4149 for the filing of a judgment lien.

By the filing of an attachment the power of alienation is not destroyed, but any conveyance must be made subject to the attachment lien. Attached real estate can be conveyed. In the same way a Bank Account can be conveyed. Even the defendant in error will not contend that the attachment

of the real estate holds the rents as they from time to time accrue. The dividends declared by the Banks are the equivalent of the rents from the real estate. Why should one be held and not the other? The rents are surely as much of an incident of the real estate as the dividends are of the bank deposits. Since the rents from real estate are not held by attachment of the realty, it is inequitable and unjust to hold that the after declared dividends on bank deposits are held by the garnishee process.

Take the case of two men, one having $5000.00 invested in real estate and the other $5000.00 deposited in a savings bank. They incur liabilities and are sued. The real estate is attached in one case, the bank account in the other. If the decision of the Circuit Court be correct, the man owning the real estate goes on and collects the rents therefrom without any interruption, but he who placed his money in the bank is immediately cut off from the dividends and deprived of his income. And this, though the conditions are precisely alike, it being uncertain and contigent whether rents will be earned in the one case or dividends in the other. To give the garnishee process this effect is to do violence to the Connecticut Law, and gross injustice to parties affected by it.

The cases referred to by the Circuit Court, supporting the claim that dividends are held by attachment of stock, have been decided under the law of the particular state in which the question arose, and they do not control in the case at bar.

That the defendant in error had but little faith in the case of Jacobus vs. Monongahela National Bank, (Opinion of Circuit Court, record, page 32) is shown by the fact that though he quoted the case in his brief filed in the Circuit Court he, in the same brief, admitted that dividends on stock would not be held by attachment in Connecticut except by virtue of Sec. 833 of Connecticut Statutes, (supra) when he said:

> "that Section 833 provides that dividends and profits on stock are attachable is further evidence of this general purpose to reach all of the debtor's property, and profits were specifically mentioned in connection with the attachment of stock because **they would not be reachable by attachment without such specification.**"

If Jacobus vs. Bank is good law and an authority, why would profits and dividends on stock not be reachable by at-

tachment without such sepcification?

When the defendant in error **admits** that the **dividends** and **profits** on **stock** are **not attachable** except by virtue of the provisions of Section 833, what becomes of the case of Jacobus vs. Bank? If the dividends follow the stock, as claimed on the authority of that case, the specification in the Connecticut Statute would be unecessary; but the defendant in error admits that the dividends and profits "would not be reachable by attachment without such specification" and in this he is correct. And specification for the attachment of dividends on savings bank deposits is just as necessary, but unfortunately for the defendant in error such specification has not been included in the law. Therefore the dividends on bank deposits are not "reachable by attachment." And not being reachable by attachment, it follows that the dividends in question are not held by the attachment, and do not belong to the defendant in error, but do belong to the United Hatters of North America.

THE CONNECTICUT LAW PROVIDES FOR REASONABLE IMMUNITY OF THE DEBTOR.

The Circuit Court in its opinion, (Record, page 31,) quotes from Ransom v. Bidwell, 89 Conn., 137, that:

> "All the property of a debtor not exempt from execution shall be made subject to the payment of his debts, and that every facility consistent with the reasonable immunity of the debtor should be afforded to subject such property to legal process."

This is unquestionably the Connecticut law, but in the same case the Court (page 141,) holds:

> "It is apparent that the words 'debt due,' as used in Par. 880 of the General Statutes, imply an **Existing obligation** to pay either in the present or future."

So that the estate of the debtor to be subjected to the payment of his debts must be an "existing obligation" and not something dependent on a "condition precedent to the liability" (Opinion of Circuit Court, Record, page 31) as it is dependent when profits must be earned and dividends declared before the debtor's rights to the estate mature.

And that the Court will carefully protect and preserve the immunity of the debtor is shown by the very recent case

Supreme Court of the United States

October Term, 1908.

No. 66

THE NATIONAL BANK OF DANBURY, vs. DANBURY, CONNECTICUT,

Plaintiff in Error,

vs.

DEMPSEY B. LOEWE, as surviving partner of the firm of D. B. Loewe & Co.,

Defendant in Error.

ERROR TO THE SUPREME COURT OF CONNECTICUT.

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Supreme Court of the United States

OCTOBER TERM, 1916.

No. 713.

THE SAVINGS BANK OF DANBURY, OF DANBURY, CONNECTICUT,
Plaintiff-in-Error,

vs.

DIETRICH E. LOEWE, as surviving partner of the firm of D. E. Loewe & Co.,
Defendant-in-Error.

BRIEF OF DEFENDANT-IN-ERROR.

Failure of the plaintiff-in-error to include in its brief "a concise abstract or statement of the case," in accordance with the rules of this Court, leaves us to supply the omission.

The United States Circuit Court of Appeals for the Second Circuit, on a writ of error sued out by Dietrich E. Loewe, modified and affirmed a judgment herein of the United States District Court for the District of Connecticut, and the Savings Bank of Danbury, the present plaintiff-in-error, on writ of error to this Court, asks for a reversal of that part of the ruling of the Circuit Court of Appeals

which modified the judgment of the District Court; it seeks a restoration of the judgment of the District Court. We refer to the parties hereafter as plaintiff and defendant, as they appeared in the lower court.

The action is one in *scire facias* brought pursuant to Section 931 of the General Statutes of Connecticut, revision of 1902, to recover attached savings bank accounts which were levied upon in the Danbury Hatters' Case (*Loewe* v. *Lawlor*) by writ of attachment issued out of the United States Circuit Court in August, 1903, pursuant to Section 880 of the General Statutes of Connecticut, revision of 1902. The only question is whether the plaintiff, as attaching creditor, is entitled to the accumulated dividends which accrued *pendente lite* on said attached deposits and were added thereto, or whether the plaintiff is entitled to interest thereon in any form. Similar actions are pending against other savings banks involving the same issue, but by stipulation, which does not appear in this record, judgment in said actions is to be controlled by the ultimate disposition of this case. The accumulated dividends on these various deposits in these respective actions which are involved in the opposing contentions of the parties amount in all to nearly twenty thousand dollars.

One of the plaintiffs having died, this action is continued by Dietrich E. Loewe, as surviving partner of the firm of D. E. Loewe & Co. (p. 11).

On September 27th, 1913, defendant appeared in this action (p. 6), and on February 16th, 1915, judgment by default was entered for want of pleading (p. 6).

On May 13, 1915, a motion was made by defendant (pp. 6-9) setting forth that in December, 1903, after the attachments, the attached bank accounts had been assigned to United Hatters of North

America, which on February 5, 1915, demanded payment of the accumulated dividends thereon (p. 5), and praying that said United Hatters be given notice of the pendency of this action and furnish indemnity against costs, pursuant to Section 937 of the General Statutes of Connecticut (pp. 5-6), and further praying that a hearing in damages upon default be granted (p. 6). An order was duly entered granting said motion (pp. 9-10), and said United Hatters thereupon filed its bond (p. 10) and served a so-called answer (pp. 10-11).

The essential facts are agreed upon (pp. 20-21) and were also found by the Court and embodied in the judgment file (pp. 11-13). All of the allegations of the complaint are admitted (p. 20), except the amount alleged to be due in paragraph 7, which amount is fixed at $18,461.54, and it appears therefrom that the plaintiffs brought a civil action in the Circuit Court by lawful writ of attachment issued and dated August 31st, 1903, demanding $240,000 damages and directing the Marshal to attach the property of over one hundred and fifty named defendants (pp. 3-4); that said writ was duly served on said defendants and upon "the Savings Bank of Danbury, defendant herein *as agent, trustee and debtor* of and to each" of the defendants (p. 4); that the plaintiffs recovered judgment against the said defendants on November 15th, 1912, for $252,130.90 (pp. 4-5), for which they took out execution (p. 5); that the Marshal to whom said execution was given for service "made demand of the Savings Bank of Danbury, the present defendant *as agent, trustee and debtor* of and to each of said judgment-debtors severally of the sums contained in said execution and his costs and fees and *of any estate* of each or any of said several judgment-debtors in its hands or money due from it

to each or any of said judgment-debtors" (p. 5). "The Savings Bank of Danbury, the defendant herein * * * refused to pay said execution or to show any estate of any of the aforesaid individual judgment-debtors or to pay any debt due from it to any of the aforesaid judgment-debtors individually to said officer whereon to levy said execution" (p. 5); that said execution was returned wholly unsatisfied (p. 5); that at the time said writ of attachment was left with the Savings Bank of Danbury in service, it "was indebted to each of said defendants severally in various sums of money and had in its hands the estate of each of said defendants and yet it would not expose or discover any said estate of any of said defendants whereon said execution might be levied, nor pay said debts or any part thereof to said officer" (p. 5). It is admitted that the amount so held by the defendant herein at the time of the attachment in 1903 was $18,461.54 (p. 20).

It is found by the Court that the moneys

> "so attached were savings bank deposits which the defendant held for the depositors under the terms of its charter which provided as follows:
>
> 'All deposits of money received by said corporation *shall be used and improved* to the best advantage * * * and the income or profits thereof *shall be applied as dividends among the persons making the deposits,* their executors and administrators, in just proportion, with such reasonable reduction as may be chargeable thereon'" (p. 12).

After the attachment, the United Hatters purchased *"the said attached estate,"* paying full value therefor, and thereupon "became the equi-

table and *bona fide* owner of said estate, subject to the rights of the plaintiff acquired by virtue of said attachment" (p. 13). That since said attachment, the defendant has, in accordance with the terms of its charter, "used and improved the moneys so deposited with it and has regularly declared dividends upon said several deposits payable from the income and profits earned by the defendant from these and its other deposits, and that the aggregate amount of dividends so declared upon the several deposits levied upon by said writ of attachment is $11,278.13" (p. 13); that subsequent to the commencement of this action, and on June 26 and July 8, 1915, respectively, the defendant made payment to the plaintiff of all the principal of said attached savings bank accounts, except the sum of $428.52 (p. 13).

The District Judge decided that the attachments did not hold the dividends or interest accruing on the savings bank deposits *pendente lite,* and that, therefore, the United Hatters of North America, the assignee of said deposits, was the rightful owner of said accrued interest and dividends, and the plaintiff could only have judgment for the unpaid balance of the principal, amounting to $428.52 (pp. 14-19); judgment was, therefore, entered in favor of the plaintiff for this small sum (p. 13). On writ of error, the Circuit Court of Appeals held that the plaintiff's rights as attaching creditor included the accumulated dividends on the deposits and ordered that the judgment in favor of the plaintiff be modified to include the amount of said dividends in addition to the unpaid principal of $428.52.

In reviewing the facts of the case, attention is also called to the statement in the opinion of the Circuit Court of Appeals to the effect that "the

record in this case does not disclose the organization, powers and mode of doing business of the Danbury Savings Bank." We think this is sufficiently disclosed by the findings of fact contained in the judgment, but the full charter of the Savings Bank of Danbury is found in Volume IV, pages 1079, 1080 of the Private Laws of Connecticut, passed in 1849, and Section 697 of the General Statutes of the State of Connecticut for 1902 provides as follows:

> "The public statutes of the several states and territories of the United States, as printed by authority of the state or territory enacting the same, and the private or special acts of this state, shall be legal evidence, and the courts shall take judicial notice of them."

This requirement of the Connecticut statutes that the courts shall take judicial notice of the act incorporating the Savings Bank of Danbury is controlling in the Federal courts (*Case* v. *Kelley,* 133 U. S., 21, 27). If, therefore, the Court feels that the disposition of this case requires acquaintance with the full charter of the Savings Bank of Danbury, it must take judicial notice of said charter, as contained in said volume, which shows that said bank is an ordinary savings bank, without stockholders.

POINT I.

The dividends accruing *pendente lite* belong to the plaintiff as attaching creditor.

The defendant contends that the savings bank dividends which accrued on the attached deposits *pendente lite* were not held by the attachment,

and that the depositor or his assignee was at any time entitled to draw out those dividends for his own use. This contention is based upon the claim that the dividends were *not due* at the time of the attachment, and that their future declaration was *contingent*. Defendant admits that if there had been a fixed agreement to pay interest to the depositor, the attachment would cover the interest, although it was not *then due*, but claims the rule does not apply where the payment of interest or dividends is subject to *any contingency*, however remote. It admits that if the garnishee had used the funds for its own benefit, even though the profits were contingent it would have to pay interest to the attaching creditor, but claims that since the garnishee used the funds for the benefit of the debtor, whom the attaching creditor was pursuing, the dividends or profits are not covered by the attachment.

The plaintiff contends that, according to fundamental principles of law and these very admissions which controlling authorities compel the defendant to make, it is obvious that the dividends are but an incident of the attached deposits and must follow the principal; that the interest or savings bank dividends payable under express contract from the profits earned on the deposits which, under the terms of its charter, the bank was bound to loan and improve for the benefit of the depositors, as their agent, are liened by the attachment as an incident and the usufruct of the principal sums. The defendant lays stress upon the proposition that rents of real estate under attachment do not go to the attaching creditor. But there is no comparison between attachments on personal property and real estate, as realty cannot be made the subject of a levy by taking possession, and

attachments on realty convey no interest to the attaching creditor (*Drake on Attachments,* Secs. 239-240).

The distinction between the attachment of real estate and the garnishment of the effects of a defendant in the hands of his agent, trustee or debtor in Connecticut is well known. In the case of the attachment of real estate, the creditor acquires no right, title or interest in the land by force of the attachment. So that a release by quit-claim deed of all his right, title and interest in such land will not release the attachment. This was decided in 1811 in *Lacey* v. *Tomlinson,* 5 Day, 79, Chief Justice SWIFT giving the opinion, in which he said:

> "An attaching creditor acquires no right, title or interest in land, by force of an attachment. The attachment has no effect but to take the land into the custody of the law, to secure it against the alienation of the debtor, and the attachment of other creditors, and to hold it to be levied upon by an execution, when judgment shall have been obtained. It is by force of the levy of the execution that any right or title to the land is acquired."

The attaching creditor has neither the possession of, nor any interest in, the land attached and has therefore no interest in the rents and profits thereof.

We are concerned only with the effect of a garnishment of debts and personal effects in the hands of an agent, trustee or debtor, and therefore limit our discussion to the law relating to such garnishments.

A. *The question is not altered by the assignment of the deposits to the United Hatters of North*

America, for the rights of the assignee are no greater than those of the assignor and are subordinate to the rights of the attaching creditor. The question is merely whether the debtor whose deposit is attached can run off with the profits or usufruct of that deposit.

> "But if, as we have understood to be conceded, though the fact does not appear upon the record or upon the motion, the assignment of the debt to the defendants was after the attachment of it by the plaintiffs, then the defendants took the exact interest of Durand (the assignor) in the debt, neither more nor less, which was an interest subject to the lien of the plaintiffs' attachment, so far as that attachment and the proceedings founded upon it were regular and legal. Taking, therefore, the interest of Durand, they would stand precisely in his place and could make any defense which he could make and none which he could not make."
>
> *Coit* v. *Haven,* 30 Conn., 197.

> "As regards assignments after the service of the process of garnishment upon the garnishee, the contrary doctrine prevails and the effect of the writ cannot be defeated by a subsequent assignment by the principal defendant, even though the assignee had no notice of the garnishment proceedings. This rule is based on the principle that *the plaintiff in garnishment succeeds to all the rights of the principal defendant* and the latter cannot by any act of his own defeat the rights of the former acquired thereby."
>
> 14 *Am. & Eng. Ency. of Law,* 858, and cases cited.

> "On the other hand, as the garnishing creditor succeeds to all rights and interests of the defendant at the service of the writ, the rights of the garnishing creditor are not

> affected by any alienation by the defendant or incumbrance created or arising subsequently to the service of the writ."
>
> 14 *Am. & Eng. Ency. of Law,* 867, and cases cited.

If, therefore, the United Hatters are entitled to recover the interest, then the original defendants, in the absence of the assignment, would have had the right to demand and receive, as fast as they came due, the interest and dividends which were payable on the deposits held by virtue of the attachment, notwithstanding that under Section 891 of the Connecticut General Statutes, the attaching creditor is entitled to the savings bank book for all the purposes for which such book is issued and is subrogated to all the rights of the depositors. Such a claim conflicts with the recognized rule that the rights of the attaching creditor and his ultimate title to the fund, if successful, relates back to the date of service and operate as an inchoate assignment of the attached fund.

B. *Since the plaintiff's title to these deposits relates back to the date of the attachment, so that he owned the deposits on all the dates when dividends were declared thereon, it necessarily follows that he owns the dividends which are inseparable from the deposits.*

The service of the attachment operated as an inchoate assignment, so that the plaintiff's title relates back to date of service and includes all dividends declared in the interim. As long as the impounded fund is earning profits, those profits, which are but an incident thereto, are alike impounded.

> "The effect of the garnishment is to make the garnishee the trustee of the money of the

defendant. The service of the garnishment process operates as *an inchoate assignment* to the plaintiff of the demand which the defendant had against the garnishee, and after judgment any payment which the latter may make in due course of law will protect him from any demand which the principal debtor may thereafter make against him. It places the attaching creditor in the same relation to the garnishee as that occupied by the debtor before the attachment was laid, securing to him all chattels, moneys, evidences of debt or any interest which the debtor has in them, * * * and this lien, such as it is, takes effect from the time of service."

Shinn on Attachment and Garnishment, Sec. 613.
Tyrell v. *Rountree,* 7 Pet., 462.
Drake on Attachments, Sec. 221.

In the case of *Jacobus* v. *Monongahela National Bank,* 35 Fed., 395 (1888), the bank having recovered judgment against Patterson, attached shares of stock in a railroad company which stood in the name of Jacobus, and when Jacobus and the railroad company were summoned as garnishees, Jacobus pleaded *nulla bona,* and the railroad company pleaded that the stock belonged to Jacobus. That case was decided by the United States Supreme Court (109 U. S., 275) on November 19th, 1883, in favor of the garnishees. At the time the attachment was served, the railroad company had in its hands a dividend of $264 on said stock, and from time to time thereafter twenty-one other dividends of $264 each were declared, and all said dividends were retained by said railroad company until the decision by the Supreme Court, when the railroad company paid the money to Jacobus without interest. This suit was brought on the recog-

nizance furnished by the bank to pay damages caused by the attachment, and the question arose as to whether the attachment compelled the railroad company to withhold the payment of subsequent dividends. Upon this point, the Court said:

> "But the defendant's counsel contend that the dividends declared after the filing of the pleas in the attachment suit were not subject to the attachment; and in support of this view they cite the case of *Benners* v. *Buckingham,* 5 Phila., 68, in which it is said that whatever comes into the hands of a garnishee in an execution attachment, after *nulla bona* pleaded, cannot be given in evidence at the trial of the issue. Whether this is consistent with the decision of the Supreme Court of Pennsylvania in *Sheetz* v. *Hobensack,* 20 Pa. St., 413, that the garnishee in an execution attachment is liable for moneys of the defendant debtor coming into his hands after the service of the writ, need not now be considered. The doctrine declared in *Benners* v. *Buckingham,* if correct, has no application here. *This was not the case of a distinct and independent fund coming into the garnishee's possession after plea filed. The dividends were but an incident to the stock—the mere fruits thereof—and were as much within the grasp of the attachment as the corpus of the stock was.* It has been adjudged that an execution attachment becomes a lien on the debtor's stock from the date of the service on the corporation; and upon a judgment therein, and a sheriff's sale, *the purchaser of the stock takes the judgment-debtor's title as of the date when the attachment was served."*

See also:

Cook on Corp., 7th Ed. (1913), Vol. II, Sec. 484, p. 1359.

Moore v. *Gennett,* 2 Tenn. Ch., 375 (1875).

The result of the defendants' contention, adopted by the District Court, would be to give the defendants *interest* when they did not own the *principal;* to give them *dividends* when they did not own the *deposits;* to give them damages for detention of property when they did not own the property. It creates the absurd result of vesting the ownership of the principal in one person and the ownership of the usufruct or interest in another.

C. *The garnishee having mingled the attached funds with his own and earned profits thereon, the attaching creditor is entitled to recover interest.*

In the case of *Woodruff* v. *Bacon,* 35 Conn., 97, the same question was raised, the defendant claiming (p. 101) that the garnishee had been restrained by process of law from paying the principal, and that there was no agreement to pay interest; but the Court said (p. 104):

> "The defendant also insists that he should not have been charged with interest on the money in his hands. But the finding shows that the defendant, when he received this money, mingled it with his own funds in one common mass, from which he withdrew so much as he had occasion to use from time to time as he saw fit; and at times he did not have on hand an amount of cash equal to the amount for which this suit was instituted. As, therefore, he actually had the use of a part of this fund, and as he treated it all as if it was his own, and as he did not keep it by itself, or so keep it that he could pay it over to the rightful owner when called on for that purpose, he clearly ought to pay interest. It is, however, claimed that the defendant is not liable for interest to the plaintiffs even if he would have been liable therefor to the original debtors, for whom he collected the money, because the interest, it is

said, is not due by reason of any contract, but only as damages for the detention of the money, and damages, it is claimed, cannot be attached. *But we cannot recognize the principle that should allow the plaintiffs to recover the debt and not allow them to recover the interest which is the mere incident to the debt arising from the defendant's use of it.*"

In the case of *Cox* v. *Cronan,* 82 Conn., 176, the Court said:

"When money belonging to a defendant is attached in the hands of a third party by process of foreign attachment, the garnishee cannot safely pay it over to either party pending the continuance of the suit in which it is attached, but must hold it to abide the result of the action. If he is not under contract to pay interest, and makes no use of the money, but retains it as a mere stakeholder, he will not be liable for interest until the result of the suit determines to which party he shall pay it. *Candee* v. *Skinner,* 40 Conn., 464, 468; *Phoenix Ins. Co.* v. *Carey,* 80 *id.,* 426, 432; 68 Atl., 993. But when he mingles the money attached with his own and has the use of it, he is liable for the interest on it."

See also:

Mattingly v. *Boyd,* 20 How. (U. S.), 128.

"It is well settled that a garnishee is *liable to the plaintiff for interest* on the amount of his indebtedness to the defendant during the pending of the garnishment proceedings if he had promised the defendant to pay interest or *if he received interest* or used the money during that time."

14 *Am. & Eng. Ency. of Law,* 837, 838.
22 *Cyc.,* 1559-1560.

In all cases where the garnishee has not been held for interest, there was no proof that the money had actually earned profits, and the issue was whether the garnishee, by virtue of his position, was chargeable with interest, *as a matter of law,* regardless of whether it was or was not earned. In cases where it affirmatively appears that the funds have been profitably employed and the principal has been augmented by virtue of such profitable employment, the principal and the increment are inseparable and always belong to the attaching creditor. There is no question here but that interest has been earned and should be paid, but merely to whom shall it be paid. It was admitted by the defendants, and is admitted in the opinion of the Trial Court, that if the garnishee "has mingled the money attached in his hands with his own" (p. 17), he must pay interest on it *to the attaching creditor,* and this is based on the theory that the garnishee is deriving benefit therefrom. If it be true that he cannot employ the funds for his own benefit without paying interest *to the attaching creditor,* by what show of reason can it be claimed that he can avoid doing so by employing them for the profit of the very men the plaintiff is pursuing—the defendants themselves? Can the defendant by an arrangement with his trustee, agent or debtor, to employ the money for his benefit, thereby impair the plaintiff's rights? It is admitted that if the garnishee employs the money for his own profit, even if those profits are *contingent,* those profits belong to *the attaching creditor;* that if the garnishee wrongfully used the funds, interest is given *the attaching creditor* as damages. The reason is that the attaching creditor is deemed to have owned the property during this period, and it is only the owner of the property who can be damaged by its detention, or profit by

its income. So, likewise, it is the owner of the property who should receive the profits, dividends or interest which have been previously fixed by agreement between the garnishee and the defendant, as in the case at bar. There is no possible arrangement whereby the defendant can continue to enjoy the benefits of his attached money. If it were in his own possession, it would be taken from him on the levy, and he could not use it. Since it is in the hands of a third party, the plaintiff, by attachment, stands in the shoes of the defendant; the plaintiff thus inherits the defendant's action for damages for misappropriation of the money by the garnishee, for agreed interest, and for agreed dividends, whether conditional or unconditional. As long as the fund is used for profit, those profits, whether earned for the benefit of the garnishee or the debtor, are impounded for the benefit of the attaching creditor for the same ultimate disposition as the principal of which they are the incident.

> "If he has attachable funds in his hands which he has put at interest, he is liable for what they yield. If he has property attachable, he is responsible for its fruits which he gathers after notice. If he uses what is attached in his hands in his general business so that it is not distinguishable from his own property or funds, he should account for its usufruct, if practicable, or pay legal interest on the amount or value."
>
> *Waples on Attachment and Garnishment,* 2nd Ed., Sec. 932.

In the case at bar it appears as one of the agreed facts (p. 20) which is embodied in the judgment (p. 13):

> "That since said attachment, the defendant herein has, in accordance with the terms

> of its charter, used and improved the moneys so deposited with it and has regularly declared dividends upon said several deposits payable from the income and profits earned by the defendant from these and its other deposits, and that the aggregate amount of dividends so declared upon the several deposits, levied upon by said writ of attachment, is $11,278.13."

Here is a finding of fact, that the attached deposits were mingled with the funds of the defendant bank, that profits had been made thereon, and that dividends had been specifically declared and appropriated from the profits so earned to reward the owner of the deposits. It would seem too plain for argument that these profits belong to the plaintiff whose title relates back to the date of attachment.

The Trial Court (pp. 16-17), and the attorney for the United Hatters, laid particular stress upon the word *"due"* in the statute, and held that inasmuch as the interest and dividends were not due, they could not be attached. Of course, there could be no valid levy unless there was a principal fund absolutely payable, but once having made a valid levy on such an attachable principal, the lien extends to the interest as a mere incident (*Jacobus* v. *Bank, supra*). In the cases cited by the defense there was no fund upon which a valid levy could be founded. The Court appears to have been convinced by these inapplicable authorities and the use of the word "due" in the statute, but the force of the argument is destroyed by the admission (p. 17) that if there was an agreement to pay interest, or the garnishee used the funds, "the interest may be attached as incident to the debt." But surely agreed interest is not more *"due"* than the agreed dividends accruing on the bank deposits. If the

word *"due"* were a bar to the recovery of these stipulated dividends because they accrue in the future, it would be equally a bar to the recovery of stipulated interest, for one is not more *"due"* than the other. The element of *futurity* is the same in each case. If agreed interest "may be attached as an incident to the debt," as held by the Trial Court (p. 17), then these dividends which are also agreed upon and are as much an incident of the debt are covered by the attachment of the principal. The fact that by the terms of the agreement the payment of dividends is dependent on certain contingencies does not alter the situation. If profits had been earned by the garnishee, the defendants admit they would have gone to the attaching creditor, even though they were contingent. Therefore, *contingency* is no test. According to the defendants' distinction, if there were an absolute agreement to pay 3 per cent. interest, with an additional bonus of 1 per cent. interest payable under certain conditions, the attaching creditor would be entitled to the 3 per cent., and the debtor could run off with the 1 per cent. To such absurdities do the defendants' arguments lead. There is no argument in support of the admission that agreed interest and damages for detention are held by the attachment which does not equally support the proposition that these dividends are held. In these other cases it is agreed income or uncertain profits earned by the garnishee which are held as an incident to the debt, and the elements of both futurity and contingency are present. The question is, who is entitled to the usufruct of the impounded fund? We say the attaching creditor; defendant says the attaching creditor if there is agreement to pay interest or if the garnishee uses the funds for his own profit; but there they stop, in the

middle of the river, and assert that if profits not absolutely agreed are made for the benefit of the debtor himself, the attaching creditor, the opposite rule must apply. The distinction is both illogical and inconsistent.

D. *The garnishment process places the attaching creditor in the shoes of the debtor.*

Whatever rights the debtor had as a depositor in the defendant bank are liened by the attaching creditor, who becomes subrogated to the rights of the debtor.

> 14 *Am. & Eng. Ency. of Law,* 867.
> *Shinn on Attachment and Garnishment* (*supra*).

E. *It is the policy of the Connecticut statutes relative to garnishment that all of the debtor's property should be reached thereby, and the same are to be liberally construed.*

> "The statute, having been made for the suppression of fraud, has always received a liberal construction."
>
> *Treadway* v. *Andrews,* 20 Conn., 394.

In *Knox* v. *Protection Ins. Company,* 9 Conn., 433, the Court said:

> "The object of the statute is to secure for the benefit of the creditor *all* the property of the debtor—all his goods, effects and credits."

In *Gager* v. *Watson,* 11 Conn., 168-171, speaking of our foreign attachment statute, the Court said:

> "The policy of our laws has ever required that the property of a debtor not exempted by law from execution, should be subject to the demands of his creditors; and that every facility, consistent with the reasonable immunities of debtors, should be afforded to subject such property to legal process. And this policy is at least as obvious now as formerly; for the rigour of former laws regarding imprisonment for debt has been, and probably will be still more, relaxed."

In *Sutherland* v. *Brown,* 85 Conn., 67, the Court said:

> "It is the policy of our law that all the property of a debtor not exempt from execution should be subject to the demands of his creditors, and that every facility consistent with the reasonable immunities of debtors should be afforded to subject such property to legal process."

In *Ransom* v. *Bidwell,* 89 Conn., 140, the Court said:

> "Our statutes relating to foreign attachment were designed to carry out more effectually the policy of our law that all the property of a debtor not exempt from execution should be made subject to the payment of his debts, and that every facility consistent with the reasonable immunity of the debtor should be afforded to subject such property to legal process."

In the case of *Woodruff* v. *Bacon,* 35 Conn., 97, page 105, the Court said:

> "In the case of *Knox* v. *The Protection Ins. Co.,* 9 Conn., 439, we held that an un-

> adjusted claim for damages for a loss on a policy of insurance might be attached by this process in a suit against the holder of the policy. The object of our statute was said in that case to be 'to secure for the benefit of the creditor all the property of the debtor and all his goods, effects and credits.' And giving the statute a fair construction as a remedial statute, we think the trustee should be held liable for all of his debt, whether principal or incident in the shape of interest, which his creditor could recover of him."

The fact that Section 833 of the General Statutes of Connecticut expressly states that the dividends and profits on stock are held by its attachment is further evidence of this general purpose to reach all the debtor's property.

That statute, enacted in 1805, provided a simple means and method whereby stock in domestic corporations could be attached directly, and was a substitute for the method of reaching it by foreign attachment, if such method then existed, as to which there seems to have been some doubt because of the peculiar relation of a stockholder to the corporation and its assets. Of course it was proper in the substitute to provide for reaching the dividends and profits accruing to the holder of such stock in pursuance of the general policy of the attachment law of the state relating to personal property.

Speaking of that statute, in *Middletown Savings Bank* v. *Jarvis*, 33 Conn., 379, the Court said:

> "And the purpose is as obvious as the language. The object is to subject the whole of every man's property to the payment of his debts. The courts favor such a construction

as will produce this result. 'The policy of our law is that every species of property shall be responsible for the payment of debts.' *Punderson* v. *Brown,* 1 Day, 96; *Flagg* v. *Platt,* 32 Conn., 216. See also the Opinion of Ch. J. Williams in *Davenport* v. *Lacon,* 17 Conn., 280."

And in the later case of *Winslow* v. *Fletcher,* 53 Conn., 393, speaking of that case, the Court said:

"The counsel for the assignees claimed that Jarvis' interest in the stock could only be taken by bill in equity or by the process of foreign attachment. Counsel for the attaching creditor contended, in an elaborate brief, that foreign attachment would not reach it. Of course the main question was, whether the stock was well attached. The court held that it was. Strictly speaking, the court had no occasion to say that it could not be attached by foreign attachment; but the court, by McCurdy, *J.*, says: 'We do not see very well how the case comes within the provisions of the law of foreign attachment, but it certainly does come precisely under the statute to which we have referred.' Now if the stock in the present suit was the stock of a domestic corporation, that case is a precedent for holding that it might have been attached directly by the ordinary process. That being so, it was not subject to the law of foreign attachment, for it was not concealed. In its nature it was as incapable of concealment as real estate. It was at all times available, accessible property, and open to attachment."

It is obvious that it was not the object of Section 833 of the Connecticut Revised Statutes (1902) to single out for some special reason the increment and profits on shares of stock in corporations as alone to be held by attachment of the

principal fund to which they were an incident, but rather to make the lien provided for therein to extend to and cover such increment in the same way as the lien by garnishment had always extended to the increment or profits of funds in the hands of an agent, trustee or debtor of the defendant. The purpose and history of this section is clearly explained in *Barber* v. *Morgan*, 84 Conn., 621, 622.

F. *The defendant savings bank was garnished as "the agent, trustee and debtor" of the original defendants, in strict conformity with the requirements of the state attachment law.* The deposits attached had been received and were held by it as their "agent and trustee" according to the terms of its charter, which created and established its agency and trusteeship. It used and improved such attached deposits as required by its charter, in conformity to the terms of its agency and trusteeship, for the profit of said defendants, and declared dividends thereon to them. Such dividends were part of the deposits and belong to the depositors. All funds of the defendant belong to the original defendants as depositors and the other depositors.

The defendant is a savings bank without capital stock whose charter expressly provides that "all deposits of money received by said corporation *shall be used and improved to the best advantage* • • • and the income or profits therefrom *shall be applied as dividends among the persons making the deposits,* their executors and administrators, in just proportion, with such reasonable deduction as may be chargeable thereon." That such an institution is the *agent and trustee* of the depositors is well settled in Connecticut as in other jurisdictions,

and the dividends and interest on their deposits are a part of the deposits and belong to them.

> "A savings bank in this commonwealth is an institution formed for the purpose of receiving deposits of money for the benefit of the depositors, investing the same, accumulating the profit or interest thereof, paying such profit or interest to the depositor, or retaining the same for his greater security, and further of returning the deposit itself. The regulations as to the payments of interest and return of deposit are prescribed partly by statute and partly by the institution itself. There is no capital stock, and there are no stockholders who are entitled to receive profits from the business. All these belong to the *depositors* and nothing is deducted therefrom except the necessary expenses of transacting the business."

Commonwealth v. *Redding Savings Bank,* 133 Mass., 19.

Stockton v. *Mechanics Bank,* 32 N. J. Eq., 166.

Una v. *Dodd,* 39 N. J. Eq., 182.

> "The charter makes the safe-keeping and investment for profit of the deposits the sole purpose of the creation of the bank. The depositors do not personally loan the money deposited, but entrust it to the bank *as their trustee or agent* to be kept, invested, managed and paid out according to the provisions of the charter and by-laws of the institution. If there is profit, they receive it; if there is loss, they carry it according to the amount of their deposits. *Bunnell* v. *Collinsville Savings Society,* 38 Conn., 203; *Huntington* v. *Savings Bank,* 96 U. S., 388, 393, 394."

Hall v. *Paris,* 59 N. H., 73.

Ward v. *Johnson,* 95 Ill., 241.

People ex rel. Newburg Savings Bank v. *Peck*, 157 N. Y., 57.

Mechanics Savings Bank v. *Granger*, 17 R. I., 79.

Rutland Savings Bank v. *Rutland*, 52 Vt., 464.

Price v. *Society for Savings*, 64 Conn., 366.

Savings Bank v. *New London*, 20 Conn., 117.

"The Watertown Savings Bank was duly chartered under the Laws of this State in 1893. The object of this institution is set forth in S. 3 of its charter, which provides that 'all deposits of money received by said corporation shall be used and improved to the best advantage, by loaning and investing the same in a manner not inconsistent with the laws of this state, and said corporation may dispose of the same as the interests of said corporation may require, and the income or profits thereof shall be applied as dividends among the persons making the deposits, their executors and administrators in just proportion, with such reasonable deduction as may be chargeable thereon.' 11 Special Laws, p. 383. These are all the provisions of the charter which relate to the question now under consideration. *It is to be noticed that there is no capital stock and there are no stockholders who are entitled to receive profits from the business. It is clear that all these belong to the depositors, and nothing can properly be deducted therefrom except the reasonable expenses of transacting the business.*

The sums of money which the defaulting treasurer withdrew were taken out of the deposits received by the bank and the income and profits derived therefrom by loans and investments. *They all belonged to the de-*

positors. This money which the receiver now has for distribution has all the characteristics of the money which it replaced. Like the original deposits and their income or profits, it must be applied under the charter of the bank as above quoted. *Price* v. *Society for Savings,* 64 Conn., 362, 366; 30 Atl., 139; *Bunnell* v. *Collinsville Savings Society,* 38 Conn., 203, 206; *Morristown Institution for Savings* v. *Roberts,* 42 N. J. Eq., 496; 8 Atl., 315; *Huntington* v. *Savings Bank,* 96 U. S., 388.

Counsel for the bondsmen point to ss. 3440 and 3441 of the General Statutes, which are as follows: 'The net income of any savings bank, in excess of one-eighth of one per cent. of its deposits, actually earned during the six months last preceding, and no more, may be semi-annually divided among its depositors. No dividend shall exceed a rate of four per cent. per annum, except as provided in s 3441. No savings bank shall make any dividend, except as provided in s 3440, until its surplus shall have accumulated to an amount equal to three per cent. of its deposits. Such surplus shall be kept as a contingent fund; but no savings bank shall carry to its contingent fund more than ten per cent. of its deposits; and any surplus beyond that amount shall be divided among the depositors entitled to such dividends, in sums of not less than one per cent. of its deposits.'

It is claimed that 'since the savings bank is the creature of statute, there is no other legal means or method of making disposition of its funds, save strictly as provided by statute; and that the liability, legal or equitable, of the savings bank to its depositor, is a fixed and constant relation that does not vary, whether the bank is or its not solvent.' It is also contended that 'the purpose of the surplus is to protect the depositor; but the laws gives to the depositor no way of reaching the surplus. Indeed, our courts seem to

sustain the view that the end and purpose of the deposits is to keep up the surplus.'

It is true that the profits or income of savings banks are not all payable at the same time or in the same way, and that they may be held by the bank as a fund until they have reached a specified amount. This is for the sole purpose of protecting depositors against unforeseen contingencies. There is nothing in these statutes which militates against the general proposition that the income or profits of savings banks belong to the depositors and are a part of the deposits. In the end, it is the general spirit and purpose of the charters of savings banks and of the laws of this state, *that depositors, or their representatives, are entitled to all the pecuniary benefits arising from the deposits, less the reasonable expenses that may be chargeable thereon.*"

Bank Commissioners v. *Watertown Savings Bank,* 81 Conn., 264.

Huntington v. *Savings Bank,* 96 U. S., 388.

We must not, therefore, be misled by the word dividends, which bears no more likeness to ordinary dividends than deposits to shares of stock. All of these dividends and deposits, whether distributed or undistributed, belong absolutely to the depositors, and the bank only acts as their joint agent.

We have, therefore, the case of an agent or trustee of the defendants using the defendants' money for profit under the direction and authorization of the defendants, so that all of said money and the profits earned thereon belong to the defendants and are subject to distribution under certain restrictions. Furthermore, such profits so earned for the benefit of the defendants have been actually distributed to the said defendants by crediting the amount thereof to the attached fund. It is admitted

that if the savings bank had used this money for its own profit, interest would be recoverable, but it is claimed that since the profits were earned for the benefit of the debtor himself, they are not recoverable. It is admitted that if the savings bank had agreed *unconditionally* to pay a stipulated rate of interest, that such interest would be recoverable, but it is contended that inasmuch as the agreement to pay interest is *conditional*, it is not recoverable. We submit that there is nothing in any of the principles laid down in the pertinent cases which justifies any such technical and unjust distinction, and that the liberal construction by which remedial statutes of this character are to be interpreted, together with the general purpose of these acts, militates against any such conclusion. It is believed that no method exists where the defendant directly, or through his agent, can continue to use for his own benefit an attached debt definitely payable a certain number of days after demand.

POINT II.

If the plaintiff is not entitled to recover the accrued dividends, he is entitled to recover 6 per cent. interest, because the defendant mingled the attached funds with its own and used them for profit.

It is found as a fact that the garnishee mingled these funds with his own and used them for profit (p. 20), and it is conceded by the Trial Court in its opinion that a garnishee who "has mingled the money attached in his hands with his own" must pay interest (p. 21).

We submit, upon the grounds set forth in this brief, that the usufruct of the attached fund, whether it be in the form of agreed interest, damages for wrongful detention, or savings bank dividends, follows the principal fund and belongs to the attaching creditor, in accordance with the principles laid down herein by the United States Circuit Court of Appeals, which should be sustained.

Respectfully submitted,

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